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By email:

The Rt Hon James Cleverly MP - Secretary of State for the Home Department
The Rt Hon Robert Jenrick MP - Minister for Immigration

CC:

Home Office SUG team
Independent Monitoring Authority

16 November 2023

Dear Home Secretary and Robert Jenrick MP,

Serious concerns about rejections of late applications to the EU Settlement Scheme [EUSS]

We are writing to you with concerns about the implementation of the Home Office's recent change in Immigration Rules and policy on the consideration of late applications to the EUSS, which came into effect on 9 August 2023.

Our letter consists of four parts:

1. The changes that have been made, and the Home Office's justification for these changes.
2. Concerns about the changes generally and their serious impact on eligible late applicants. This impact is exacerbated by the fact that these rejections do not come with a suitable means of legal challenge.
3. Concerns about the specific issue of EUSS application rejections which are impacting individuals in possession of UK Home Office issued status documents under the EEA Regulations, that either have no expiry date or have an expiry date in the future.
4. Our recommendations for urgent consideration.

1. Changes to the Immigration Rules and policy on late applications

Changes to the Immigration Rules on late applications to the EUSS

The Statement of Changes HC 1496, laid on 17 July 2023, introduced to EU9 the following requirement for an application to be valid:

> *'(e) It has been made by the required date, where the date of application is on or after 9 August 2023'.*

Although the definition of 'required date' contains within it the discretion on reasonable grounds for a late application, the drafting of EU10 means that there is no overall discretion to consider an application which does not meet ***all*** the validity requirements:

> *'EU10. (1) An application made under this Appendix will be rejected as invalid where it does not meet the requirements in paragraph EU9'.*

In other, simplified, appendices to the Immigration Rules, there is discretion to waive this requirement. For example, a range of appendices, including Skilled Worker and Private Life, contain this discretion:

> *SW 1.6. An application which does not meet all the validity requirements for a Skilled Worker **may** be rejected as invalid and not considered.*
>
> *PL 1.4. An application which does not meet all the validity requirements for the Private Life route is invalid and **may** be rejected and not considered.*

These general discretionary provisions within the validity rules are important to ensure that validity requirements, which may be disproportionately prescriptive or difficult to meet in the circumstances of an individual case, do not result in applications being unduly rejected. Invalidity can have serious consequences for the temporary protection of rights and/or status, as an invalid application does not engage section 3C of the Immigration Act 1971 and in EUSS cases results in no certificate of application being issued. Providing caseworkers with discretion to consider applications, discretion not to reject applications, where appropriate, avoids the need for applications to be considered outside of the Immigration Rules. The discretion is clearly helpful in a large number of circumstances, detailed for other routes in the Home Office's 'Validation, variation, voiding and withdrawal of applications' guidance.[1] It also avoids the undue complexity of seemingly granting applicants under a route, with the conditions that would ordinarily be attached to that route, when applicants do not meet all of the requirements of the route. Accordingly, in the interests of simplification and consistency across the Immigration Rules, we commend the approach the Home Office has taken to make discretion part and parcel of the validity requirements. Appendix EU should not continue to be an outlier to that approach.

Changes to the policy around late applications to the EUSS

As the Explanatory Memorandum to the Statement of Changes[2] explains, the Immigration Rules for the EUSS in Appendix EU have been changed "*to make meeting the deadline for the application (or, in line with the Citizens' Rights Agreements, having reasonable grounds for the delay in making an application) a validity rather than an eligibility requirement. Consistent with the Agreements, this will enable the Secretary of State to consider whether there are reasonable grounds for a late application as a preliminary issue, before going on to consider whether a valid application meets the relevant eligibility and suitability requirements.*"

At the same time as changing the 'reasonable grounds' test from an eligibility to a validity test, the EUSS caseworker guidance[3] has been updated to severely limit the types of circumstances the Home Office will accept as demonstrating reasonable grounds for submitting a late application. Although we acknowledge that the list of examples in the guidance is not exhaustive, nevertheless caseworkers will likely perceive the scope to exercise discretion outside of the guidance to be limited due to the restricted nature of those examples.

[1] Home Office, 'Validation, variation, voiding and withdrawal of applications' (updated 5 October 2023) <https://www.gov.uk/government/publications/specified-application-forms-and-procedures/validation-variation-voiding-and-withdrawal-of-applications-accessible> accessed 13 November 2023.

[2] https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1496-17-july-2023

[3] https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance

Without the overriding general discretion in EU 10(1) of the Rules, as described above, caseworkers may thus see their hands tied in interpreting EU 9(e) of the Rules, and the definition of 'required date' contained within that rule.

Justification for the changes in policy

We have been given to understand that the reason for these changes is to tackle what the Home Office is referring to as "speculative" and "abusive" applications.

The Home Secretary stated in a letter[4] to the House of Lords European Affairs Committee on 25 May 2023: "*However, more than two years since the 30 June 2021 application deadline for those resident in the UK by the end of the transition period, we are seeing more speculative and abusive applications and refusal rates are increasing. We are determined to protect the integrity of the scheme and will take whatever steps are necessary to ensure that.*"

Lord Murray of Blidworth stated in a debate[5] in the House of Lords on 11 September 2023 that "*it is right and proper that we take steps to maintain the integrity of the scheme, including measures to protect it from abuse*". He then set out that on average, 18,000 late applications continued to be made to the EUSS per month in the first six months of 2023, and that the refusal rate of these late applications stands at 47%. He went on to say: "*This change in process reduces the scope for speculative applications to the scheme solely to benefit from the temporary protection available until an application is finally determined.*"

Continued successful grants of status to late applicants before the change in policy

The quoted refusal rate of course also implies an acceptance rate. Indeed, as at 30 June 2023, **over 184,000 grants of pre-settled and settled status** have been awarded to those who missed the 30 June 2021 deadline - an average of over **nearly 7,700 grants of status per month**. Looking just at the first six months of 2023, **over 6,000 late applications, per month,** were successfully granted status.

It is evident that these successful late applications were neither speculative nor abusive and that there continues to be a need for the EU Settlement Scheme to operate with the 'looking to grant' attitude that the scheme was established under. We are concerned that the current policy and approach is producing disproportionate and unreasonable outcomes leading to significant disruption and impact for those who call the UK their home.

2. Concerns on late applications policy generally

The Home Office crackdown on 'speculative' or 'abusive' applicants is costing eligible late applicants their future in the UK. In many cases this will tear families apart. The Safeguarding User Group warned the Home Office repeatedly in advance that this would be the consequence of this change in Home Office policy.

It is a matter of fact that our neighbours, colleagues, family and friends who are ***eligible*** for status under the EUSS will now be ***denied*** that status without an urgent change in approach by the Home Office.

[4] https://committees.parliament.uk/publications/41114/documents/200393/default/

[5] https://hansard.parliament.uk/Lords/2023-09-11/debates/5C0B0501-8A1D-4FA2-8F2F-8B768C6FC97D/Citizens%E2%80%99Rights(EuropeanAffairsCommitteeReport)

There remain eligible individuals who have, for many different reasons, simply not yet applied to the EUSS. This is evident from the fact that before the change in policy, on average over 6,000 late applications per month were successfully granted status. In all our years of experience with the Scheme - both through reports to the3million, and through referrals to the caseworking signatories of this letter - we have never met someone who knew they needed to apply but did not do so without a good reason.

Many of these eligible individuals will simply not have known they needed to apply to the Scheme, and will only have found out their need to do so through a 'trigger event'. Other eligible individuals will have been attempting to apply to the Scheme, and struggled to provide sufficient evidence of their eligibility resulting in refusals, with Settlement Resolution Centre [SRC] staff members telling them 'just apply again'. Yet others will have applied and been ***unaware*** that they have been refused, again only finding out about their refusal through a 'trigger event' such as a border crossing.

Events that can trigger awareness of the need to apply to EUSS

People can live in the UK for years without a trigger event making them aware that they need to interact with the State in relation to their status. This was made exceedingly clear by the Windrush scandal, in which many people discovered their lack of proof of status many years after changes in policy and legislation. Wendy Williams' Windrush Lessons Learned Review[6] report cites the following comment from a politician:

> "*There was an assumption that this was going to be really small numbers and … that* ***it was inconceivable that there could be thousands of people who weren't properly documented****, who hadn't ever crossed the border, who because they'd acquired their employment … back in the 80s, 90s or early 2000's or they were living in accommodation that was settled and static, they weren't trying to move,* ***they just weren't having that trigger point****. But at any point, going forward…when they got to pension age, [when] they had a health issue and suddenly came into contact with the NHS, that it was sort of stored up waiting to happen for them.*"

The triggers that can make someone, having in the past lived lawfully in the UK, aware that the legal basis of their residence has shifted beneath their feet, can include the following (non-exhaustive) list of events:

- A right-to-work check for a new job application, or by a current employer
- A right-to-rent check in England for a new rental, or by a current landlord
- Receipt of NHS secondary health care
- An interaction with a UK Border Force officer when entering the UK
- An application for, or renewal of, a driving licence with DVLA
- An application for assistance from the DWP or a local authority

While we do not want to jump too quickly to comparisons with the Windrush scandal, we strongly make the case that **the Home Office's recent change of policy on late applications is causing exactly the same outcomes for individuals**, even if the underlying causes and policy and legal landscape is different to those of the Windrush scandal.

In some cases, such a trigger event could have occurred soon after the end of the grace period. However, in the examples cited below, the individual's misfortune is that the trigger event, leading to the realisation they needed to apply to the EUSS, came after the Home Office change in policy towards late applicants on 9 August 2023. In no sense has the reason why they failed to apply to the EUSS diminished as time has passed, it is

[6] https://www.gov.uk/government/publications/windrush-lessons-learned-review

only the change in policy that is now preventing them from successfully obtaining EUSS status once their lack of awareness turned into awareness.

A trigger event ***after*** 9 August 2023 will lead people into life-ruining spirals of Home Office rejections without the right of appeal, loss of employment, housing, benefits and ability to maintain a life in the UK.

Example 1: Long-term resident unaware that the Scheme applied to them

An 80 year old Austrian national has lived in the UK since the 1980s. Although they heard about the EUSS on the radio, they did not think that they needed to apply to the EUSS. They thought that Brexit would not impact them because they were married to a British citizen and had lived in the UK for so long.

They were retired, owned their own home, and although they had used the NHS in the past, they had not had any secondary NHS healthcare since the end of the transition period. They were in receipt of a UK state pension, but did not receive any communications from DWP about their need to apply to the EUSS.

Since the end of the transition period, they have travelled abroad three times. The first two times they returned to the UK, they were not told anything at the UK border about the need to apply to the EUSS. It was only very recently, when returning to the UK for a third time, from a holiday, that they were told by an officer at the border that they should apply to the EUSS. The applicant did so within days, with the support of their spouse and explained in their application that they had compassionate reasons for applying late. The Home Office rejected their application and set out that they had not provided sufficient reasons to apply late to the scheme. They are now preparing a second application to the EUSS but are concerned they will be rejected again. Meanwhile they are worried about accessing healthcare in the UK whilst they continue through this process.

Example 2: Eligible due to historic permanent residence, but unaware that she needed to apply earlier while still abroad

A Spanish national who has lived in the UK since the mid 2000s, had left the UK to be with her family in Spain during 2019. She was ill and wanted to be closer to her family whilst she received treatment. Owing to the pandemic and other complications she was only able to return to the UK during 2023.

On returning to the UK, she applied to the EUSS. She was eligible as she had already completed five years worth of residence before the end of the transition period and had not been absent for more than five years. She was not aware that she should have made this application by any deadline, before returning to the UK.

Her application was rejected for lack of reasonable grounds for applying late, despite providing information about her receiving treatment overseas and her residence in the UK.

She submitted a further application with the support of a solicitor. That application has now resulted in a Certificate of Application. Had it not been for the intervention of a lawyer, it is unlikely the applicant would have her application accepted as valid by the Home Office.

Repeat applications after previous refusal

There are many who have previously applied to the EUSS, whether in time or late, whether once or more than once, who have failed to secure the status they are entitled to. This can be for many reasons - they had difficulties engaging with the process without legal representation, or they were not contacted by the Home Office, contrary to the claims in their refusal letters which speak of “numerous” attempts by the Home Office

to contact the applicant. Section 3(b) of a recent report by Here for Good[7] provides detailed evidence of the problematic claims of attempted contacts.

Article 18(1)(o) of the Withdrawal Agreement states:

> *"the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;"*

We have heard consistent and widespread anecdotal evidence from individuals and advisors that the Home Office did not in fact contact applicants, or that several 'missed calls' in a short space of time without leaving a message or number to ring back constitutes multiple 'contacts', contrary to the EUSS Caseworker Guidance[8].

Despite repeated warnings from the Safeguarding User Group, the Home Office approach to supporting applicants to prove their eligibility (now at page 226 onward at guidance) has changed very little since 30 June 2021, the end of the grace period. While the consequences of refusal significantly changed at that date, the standard process of '3 attempts over 3 weeks' stayed the same.

The Home Office assessment that it did not need to do more to support applicants to prove their eligibility after the deadline passed was wrong. This has led in no small part to the situation many are now in. In practice, the Home Office approach to supporting applicants can mean one email sent to the applicant together with a text message on the same day, followed by another email 14 days later that can lead to a refusal if evidence is not provided within 7 days. No-one denies the importance of the EUSS application process and the significance to a person's life, but this 'one size fits all' approach to supporting applicants excludes far too many and denies the reality of people's day to day lives. Even when applicants receive and review them in time, the emails sent out can be incomprehensible to many, and often do not make clear exactly what further evidence the applicant needs to supply, and for which period.

Furthermore, for a very long time the SRC advised applicants, who telephoned the SRC for help because they had received a refusal, to simply 'apply again'. This means that many eligible applicants, on receiving refusals, submitted new applications, potentially more than once, rather than engaging with an appeal process which many may have felt was too difficult, particularly without legal representation.

The new, restricted guidance on late applications, sets a high threshold for being able to make a repeat late application, requiring for example doctor's evidence of the applicant's underlying physical or mental conditions:

> "*Where a person has already made an **in-time** application to the EU Settlement Scheme, and this application has been refused, they will not normally be able to make a late application to the scheme based on there being reasonable grounds for their delay in making their application, as they previously met the deadline applicable to them. [...]*
>
> *They will not normally therefore be able, after the deadline applicable to them, to make a further, valid application to the scheme. However, there may be occasional circumstances in which there may be reasonable grounds for a refused, in-time applicant to make a late, further application to the scheme, such as, for example, where there is a good reason related to an underlying physical or*

[7] https://hereforgoodlaw.org/wp-content/uploads/2023/06/Final_Evidence-report-on-the-impact-of-Home-Office-decision-making-under-the-EU-Settlement-Scheme.pdf

[8] P226, https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance

mental condition why they did not engage with our attempts to contact them following an earlier, intime application to obtain further information or evidence as to their eligibility for status under the scheme.

[...]

*Where a person has already made a **late** application to the EU Settlement Scheme and this application has been refused or rejected (which may have been because they were not considered to have reasonable grounds for their delay in making their application), then they will not normally be able to establish that there are reasonable grounds for them to make a further late application to the scheme. However, [...]*

In all cases, you will ordinarily need to see objectively verifiable evidence to be satisfied that there are reasonable grounds for the person to make a further application to the scheme (for example, a letter from a doctor).

Example 1: Previous refusal due to unrepresented individual struggling to engage with the EUSS process

An EU citizen who has lived in the UK since before December 2020, and who has tried on more than one occasion to provide the evidence to secure their status under the Scheme. They have dyslexia, speak only basic English and have poor IT skills. Since their last refusal a few months ago, they attempted to gather more evidence of their residence, and then submitted a new application - after the 9 August 2023 change in Home Office policy.

When asked to fill in their reason for a late application, in a textbox with a 300 character limit, they explained their dyslexia and struggle with IT.

The application was swiftly rejected as below, following which the individual found out about the3million and contacted us.

"Home Office records show you have previously made an in-time application to the scheme, unique application number (UAN): xxxx-xxxx-xxxx-xxxx, and that application was refused on xx xxx 2023.

Where a person has already made an in-time application to the EU Settlement Scheme, and this application has been refused, they will not normally be able to make a late application to the scheme based on there being reasonable grounds for their delay in making their application, as they previously met the deadline applicable to them. The decision on their in-time application will have considered whether they qualify for status under the EU Settlement Scheme, subject to any application for administrative review or appeal.

You have not provided sufficient information and evidence with your application to show there are reasonable grounds for you to make a further application to the scheme.

In particular, the information/evidence you have provided:

• does not explain the reasons for your delay in making your further application in sufficient detail

• solely addresses missing the deadline applicable to you rather than the reasons for your delay in making your application

• does not provide sufficient explanation as to why you did not promptly make a further application once your previous application had been refused

Your application does not meet the requirements for a valid application set out in paragraph EU9 of Appendix EU and therefore your application has been rejected as invalid."

We are urgently referring them to organisations that can provide legal advice as, following the Home Office policy changes, without legal representation they will have no chance whatsoever of understanding what is required from the rejection letter, or of securing their rightful status.

Example 2: Applicant not knowing that they had been refused

An EU national, who lived in the UK since she was a child, made her own application to the EU Settlement Scheme before the deadline in June 2021. Due to her having periods not working because of childcare and then being in self-employment the tax checks done by the Home Office didn't find a full footprint of her residence in the UK. The Home Office sent emails to her asking her to provide evidence of her residence. The applicant sent her evidence to the Home Office by post, not realising that the Home Office had already refused her application 2 weeks earlier.

The applicant didn't realise her application had been refused and assumed she had done everything needed of her. She continued her life as normal until she was stopped in the airport in October 2023 coming back from a family member's funeral abroad. She was told by an immigration official that her EUSS application had been refused in 2021 and she was given 28 days permission to enter the UK and advised to apply to the EUSS again.

She was shocked and scared. Her whole life in the UK, her family life with her settled partner and child, were thrown into doubt. She immediately made another EUSS application, but by this time the new late applications approach was in place and her application was rejected within a day.

She contacted a legal advice charity in despair. The charity, one of those funded by the Home Office to provide EUSS application support, was disappointed that her initial application in 2021 had been refused given it didn't take them long to work with her to view all the evidence needed to prove her eligibility. Had the Home Office better engaged with the applicant 2 years ago, she wouldn't have been in this crisis position. The charity invested considerable time into preparing another EUSS application which succeeded, resulting in the grant of settled status the applicant had always been entitled to.

Without the intervention of a specialist lawyer, the applicant would likely have been denied her rights under the EU Settlement Scheme. The charity itself is despondent. It has not seen the level of desperation around the EUSS that now exists because of the late applications policy. It cannot possibly give the help needed to everyone who needs it to make a late application, the Home office grant funding scheme is nowhere near enough. It said: 'charities have been warning about 'cliff edges' in respect of the EUSS for some time. With no warning, the cliff edge arrived on 9 August 2023 leading to shockingly unfair outcomes for so many people.'

Example 3: Previous refusals due to unlicensed immigration advisors

A qualified OISC immigration advisor contacted us recently about an individual - who is eligible for status under the EUSS - who has turned to their organisation in despair having received a rejection. The advisor wrote:

"The applicant arrived in the UK in December 2020 and has made multiple applications to the EUSS. She has had difficulty with residence evidence, but has also been badly served by unlicensed immigration advisers who have handled a series of applications very badly. She made her most recent

application after 9 August 2023 and has been refused on the grounds of no legitimate reasons for a late application. She has now been suspended from work as she has no status."

Example 4: Previous refusals with Home Office stating she could apply again

A French national who has lived in the UK since 2001 applied late to the EU Settlement Scheme during January 2023. She had previously believed that she did not need to apply because she had a British child and had been repeatedly reassured by her husband that she didn't need to do anything. However, following a discussion she had with a friend she realised that she needed to apply.

The applicant's application was initially refused because she had not provided sufficient evidence to the Home Office. The letter from the Home Office explained that she could submit an appeal, apply for an administrative review **or apply again**. Given that she had the evidence and thought it was all a mistake, she chose to apply again.

Her second application was submitted in June 2023 and this was, again, refused because she had not provided sufficient evidence - this was despite giving information of her residence in the UK since 2007 and being the recipient of child benefit and other state income types. Again, the refusal letter set out that she could submit an appeal, apply for an administrative review **or apply again**.

She applied a third time in October 2023. This application was rejected on the grounds that she did not have reasonable grounds to apply late owing to amongst others her two previous applications.

She is now preparing a further application with more evidence of her living in the UK for over 20 years and hopes to get a Certificate of Application. She is worried about her son who has recently started high school and whether she will be required to leave the UK. She has recently purchased a house and is worried that she will be forced to leave everything behind in the UK.

Examination of applicants' reasonable grounds for a late application

Applicants are given a 300 character limit in the EUSS application form to explain their reasonable grounds for a late application. Even where additional evidence of reasons for applying late is uploaded separately, it appears that it is often ignored, and applications are rejected just on the basis of the information supplied in the 300 character-limit textbox. The guidance directs a caseworker who considers that an applicant does not have reasonable grounds for a late application, as follows: "*you are not required to contact the applicant and the application must be rejected as invalid*". This is quite distinct from the approach adopted by the Home Office when establishing if someone is eligible for status and the attempts made to contact applicants for further information to support their application.

Article 18(1)(d) of the Withdrawal Agreement, which covers late applications, states:

> *"where the deadline for submitting the application referred to in point (b) is not respected by the persons concerned, the competent authorities* ***shall assess all the circumstances and reasons for not respecting the deadline*** *and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline;"*

If an eligible applicant was genuinely unaware of their need to apply to the EUSS, despite the 'wide range of communications activity' and the 'wide range of support available to applicants', Article 18(1)(d) makes clear that the Home Office still has a duty to engage with the individual, all their circumstances and their claim to have been unaware of their requirement to apply to the Scheme.

The direction in the EUSS caseworker guidance is that being unaware of the requirement to apply "*will generally no longer be considered reasonable grounds for their delay in making their application to the scheme, unless there are very compelling practical or compassionate reasons beyond those – such as lacking the physical or mental capacity to apply or having significant, ongoing care or support needs – which are already covered by this guidance.*".

As the guidance states, these very compelling practical or compassionate reasons are already covered elsewhere in the guidance, which means that being unaware of the scheme is simply no longer considered a 'reasonable' reason for missing the deadline.

The British public would overwhelmingly accept that a genuine lack of awareness is by definition 'reasonable', and the Home Office should not fall into the trap of thinking otherwise simply because of its own considerable investment and focus on the EU Settlement Scheme for the last five years. Reasonableness should be objectively assessed.

The section titled "*Circumstances which will not generally constitute reasonable grounds for delay in making an application*" is therefore woefully inadequate, and in our view not in accordance with the letter or the spirit of the Withdrawal Agreement.

No right of appeal when applications are rejected

Article 21 of the Withdrawal Agreement, entitled "Safeguards and right of appeal" states:

> *"**The safeguards** set out in Article 15 and Chapter VI of Directive 2004/38/EC **shall apply in respect of any decision by the host State that restricts residence rights** of the persons referred to in Article 10 of this Agreement."*

A decision by the Home Office to reject an application on the basis of a lack of 'reasonable grounds' for having missed the deadline clearly restricts the residence rights of the individual concerned, and as such applicants must be protected by these safeguards which include:

> *"The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State **to appeal against or seek review of any decision taken against them on the grounds of public policy**, public security or public health."*

and

> *"The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. **They shall ensure that the decision is not disproportionate**"*

3. Concerns on changed 'reasonable grounds' guidance for those with existing Home Office documentation

The previous EUSS caseworker guidance[9] acknowledged that people with existing documents under the EEA Regulations which appeared to not have expired, and who were unaware that this documentation was invalid and that they needed to apply to the EUSS, had reasonable grounds for a late application to the scheme.

Similarly, the previous guidance considered that people with existing (non-EUSS) indefinite leave to enter/remain who were not aware that they could apply to the EUSS to be recognised as beneficiaries of the Withdrawal Agreement, had reasonable grounds for a late application.

We cannot understand how being in possession of a UK Home Office document, that appears to the holder to still be valid, could possibly be anything except the very *definition* of a reasonable ground for not applying to the scheme, and we urge you to revise the guidance accordingly.

In any case, we cannot understand how someone in possession of a UK Home Office document, that appears to the holder to still be valid, who is living in the UK and otherwise eligible for EUSS status, can possibly be considered to be making a "speculative" or "abusive" application.

Trigger events for EEA Regulations document holders to become aware they must apply to EUSS

Whilst some holders of EEA Regulations documents will have applied for EUSS status, other such holders would have been completely unaware that the legal status of their documents had changed. This was acknowledged by versions 9.0 to 19.0 of the EUSS caseworker guidance, which acknowledged the complex legal situation created by the end of free movement and stated:

> "*Where a person subject to the 30 June 2021 application deadline for EEA citizens and their family members resident in the UK by the end of the transition period has a biometric residence card or other residence document issued under the EEA Regulations which remains valid at that date, they may not realise that, with the end of the grace period, they can no longer rely on an EU law right of residence in the UK and need to obtain UK immigration status under the EU Settlement Scheme.*
>
> *They can make a late application to the scheme where you are satisfied, in line with this guidance, that, at the date of application, there are reasonable grounds for their delay in making their application because, for example, they were not aware that they needed to apply to the EU Settlement Scheme."*

In these instances, evidently there would need to be a trigger event – such as an interaction at the UK border, or an employer checking the right to work – to lead the person to question the validity of the document issued by the Home Office, resulting in them becoming aware of the necessity to apply to the EUSS.

In some cases the trigger event has been the expiry date on the EEA Regulations document nearing and the person attempting to replace the document (which will be unsuccessful as they lack the underlying legal status).

In the examples cited below, holders of EEA Regulations documents have been able to continue living their lives 'lawfully' in the UK, relying on the document with no indication that their lawful residence status had

9 https://webarchive.nationalarchives.gov.uk/ukgwa/20230412152746/https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance

come to an end. Many individuals will not yet have encountered any 'trigger events'. However, others will have gone through potential 'trigger' events as missed opportunities. This is, as demonstrated by the examples below, because employers, landlords, other stakeholders and even the Home Office itself do not appear to realise that such documents are no longer valid, and therefore vital opportunities to alert the holder to the need to apply to the EUSS have been missed.

For example, the Home Office guidance "EEA nationals at the border post grace period"[10], in the section entitled "Border approach to those who miss the deadline" states that:

> "***The overall approach requires that all individuals be given an opportunity to make a late application to the EUSS.***
>
> *Where you encounter an EEA national or their family member at the border after 30 June 2021, who has not made an application to the EUSS but claims that they were resident in the UK by 31 December 2020, you must assess their claim based on the evidence available to you.*
>
> *When assessing whether such an individual was resident in the UK by 31 December 2020, you may ask the individual (or any accompanying passenger who may hold evidence on their behalf) to provide evidence to support this claim. Such evidence may include, but is not limited to:*
>
> *• documentation issued under the EEA Regulations 2016 (such as a residence card or registration certificate)*
>
> *[...]*
>
> *In all cases, where the individual can establish to the balance of probabilities that they were resident in the UK by 31 December 2020, you must give them the benefit of the doubt and either refuse them permission to enter but grant immigration bail to allow them to make a late application in country or, where compelling circumstances apply, grant them a period of leave outside the rules."*

However, the experience of several EEA Regulations document holders is that they have been able to travel in and out the UK including passing through immigration desks without ever being granted leave to enter outside the rules or notified to apply to the EUSS by border officers.

Finally, it should also be noted in this regard that the actions of the Home Office are a contributory factor as to why some EEA Regulations document holders did not apply to the EUSS by the deadline. Firstly, there was no effort made by the Home Office to contact this cohort to notify them that their EEA Regulations documents would no longer be legally valid after 30 June 2021 and that they needed to apply to the EUSS. As these are persons who had previously made themselves known to the Home Office by applying for EEA Regulations documents in the first place, the Home Office held their last known contact details and so could have made efforts to communicate directly with them in a cost effective way. As the previous iterations of the EUSS caseworker guidance confirm, the Home Office was clearly aware this was a group who may not understand the need to apply to the EUSS. It is therefore inexplicable that efforts were not made, using the contact information the Home Office possessed, to attempt to directly engage with these individuals, to ensure they applied to the EUSS and protect the residence status they had established under free movement law.

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10 https://assets.publishing.service.gov.uk/media/625e9396e90e072a001c75f5/EEA_nationals_at_the_border_post_grace_period.pdf

Examples of EUSS applicants with existing Home Office documentation who have been rejected since 9 August without a right of appeal

Example 1 - a non-EU citizen with a permanent residence vignette in a passport

A non-EU citizen has a permanent residence vignette in his passport, which shows a future renewal date. His EU citizen wife and children applied to the EUSS in time, and were granted settled status. The entire family was genuinely unaware that he was also required to apply to the EUSS, as all the communications both from the Home Office and from their employers was focused on EU citizens. Some communications mentioned family members, but they thought that meant their (EU) children.

- He travelled into the UK on more than one occasion - even in 2023 - and showed his passport with the (legally no longer valid) vignette to a Border Force officer. On each occasion the officer stamped his passport as usual and did not ask or say anything about the EUSS.

- The Home Office issued a visitor visa based on him providing "*maintenance and accommodation support*" and presenting his (legally no longer valid) vignette. The Visit caseworker guidance[11] states "*Maintenance and accommodation support can be provided by a third party, including family members, friends and other people with whom the applicant has a genuine personal or professional relationship. If the third party is in the UK, they must not be in breach of immigration law at the time of the decision on the visitor's application or their entry to the UK.*" If a visa-issuing department of the Home Office is unaware that a vignette is no longer valid, how can the Home Office claim that the holder of that vignette should have been aware?

- He was able to apply for a visa in 2022 to visit an EU country, without that embassy alerting him to the fact that the vignette he presented as evidence of his right to live in the UK was no longer legally valid, and that he needed to apply to the EUSS.

- His employer is a state employer and they had never alerted him to the need to apply to the EUSS and his right to work lawfully in the UK was never challenged.

- He was able to secure a mortgage and purchase a property without any bank or solicitor alerting him to the fact that the vignette was no longer legally valid.

- As his Home Office documentation was nearing its apparent expiry, he was unsure how to renew it, and therefore submitted an "No Time Limit" [NTL] application. This was before the change in late application policy. Almost six weeks later, and crucially ***after*** the 9 August 2023 change in late application policy, he received a reply which stated (incorrectly): "***As you have status under the EU Settlement Scheme****, you have selected the incorrect option on the application form. You should instead apply for a replacement Biometric Residence Card (BRC) (issued under the EU Settlement Scheme).*"

The individual therefore finally only became aware of the need to apply to the EUSS after he received (flawed) information from the Home Office. As soon as he realised, he submitted an application but it was rejected

[11] https://www.gov.uk/government/publications/visit-guidance

within weeks, without the Home Office recognising a right of appeal. Despite having explained that he had a valid permanent resident sticker, his rejection letter stated:

> *"You have not provided sufficient information and evidence with your application to show there are reasonable grounds for your delay in making your application to the scheme. [...] and therefore your application has been rejected as invalid."*
> *…*
> *"There is no right to an administrative review or an appeal in respect of an invalid application."*

The family were in despair - he stood to lose all his rights in the UK despite having lived here for many years. They did not even know how to tell their children. As he said to us "*Why would I NOT have applied if we had known we needed to? It was a free scheme - of course I would have done it if I had realised.*"

Only after obtaining the services of a solicitor, and by initiating Judicial Review proceedings, was the rejection overturned and the Home Office agreed to look again at the application. He was later granted settled status.

Example 2 - an EU citizen with a Permanent Residence 'blue card'

An EU citizen who has lived in the UK for 14 years, and is married to a British citizen, applied for a Permanent Residence card in 2016. The card that was issued states "*Type of Document: Document Certifying Permanent Residence*". The Home Office letter that accompanied it states "*Please find enclosed a document which confirms that you have a permanent right of residence in the UK."*

She was aware of the EU Settlement Scheme, and helped various family members successfully apply for status. However, she genuinely thought the scheme did not apply to her because she thought that her Permanent Residence card meant that she had indefinite leave to remain and therefore did not need to make a further Home Office application.

- She was never contacted by the Home Office to tell her that this once-permanent card was no longer valid, despite the fact that the Home Office would have had her contact details.
- She travelled in and out of the UK on many occasions, and was always either let in without challenge through e-Gates, or by Border Force officials who she showed her Permanent Residence card to.
- She recently tried to renew her EHIC card, and her Permanent Residence card was rejected as invalid. She started researching, and sought clarity from a Home Office representative who - entirely incorrectly - told her to apply for a biometric residence card. She went through the whole UKVCAS process of obtaining biometrics without anyone telling her that this was not an appropriate application.

It was only when her biometric residence card application was rejected as invalid that she was told that she needed to apply to the EUSS. She did this, using the 300 character-limited 'reason for late application' box to explain that she had a Permanent Residence card which she had not realised was no longer valid.

Within 24 hours she received a rejection letter, which stated:

> "*However, that information and evidence is not considered to constitute reasonable grounds for your delay in making your application.* ***This is because having already issued permanent residence is no longer considered to constitute reasonable grounds for delay in making an application to the scheme****, unless there are very compelling practical or compassionate reasons beyond those which in themselves constitute such grounds. You have not included any such reasons in your application.*

You have not provided sufficient information and evidence with your application to show there are reasonable grounds for your delay in making your application to the scheme.

Your application does not meet the requirements for a valid application set out in paragraph EU9 of Appendix EU and therefore your application has been rejected as invalid.

[...]

There is no right to an administrative review or an appeal in respect of an invalid application."

She now faces submitting a new application with the help of a lawyer, trying to argue "compelling practical or compassionate reasons". She cannot afford the quote for legal fees she has received, and turned to the3million in despair.

Example 3 - non-EU citizen with Permanent Residence vignette in passport

A non-EU citizen is married to an EU citizen. Her husband and children all have EU passports and settled status under the EUSS. They have lived in the UK for nearly two decades. She got a Permanent Residence card stamp on her passport in 2014, expiring in 2024.

- Since the deadline of the scheme, she made several trips abroad, and was always able to re-enter the UK with her passport showing the PR stamp. Each time she had to interact with a Border Force officer, and not once was she asked any questions or alerted to the fact that she had to apply to the EUSS.

She only finally became aware of the EUSS requirement on her most recent trip in August, when a Border Force officer brought it to her attention that she should have applied for settled status.

She applied immediately, and again received an almost instant rejection stating that her given reason was no longer a reasonable ground for a late application.

Before reporting to the3million, she attempted to seek legal advice and was advised that her only other option was to apply for a spouse visa which is very expensive and a process that would require many more years to obtain indefinite leave to remain.

4. Our urgent recommendations

Before 9 August 2023, the Home Office caseworker guidance on 'reasonable grounds' was indeed reasonable.

However on 9 August 2023, the Home Office made two changes at once:

- The 'reasonable grounds for a late application' test was moved from the eligibility stage to the validity stage, thereby allowing the Home Office to reject an application without looking at any of the eligibility evidence, and at the same time removing the right to appeal against such a rejection.
- The guidance on 'reasonable grounds' was severely restricted by removing far too many examples of 'reasonable grounds' available to guide decision makers.

These two simultaneous changes working together have had a catastrophic impact.

We are now finding that it is becoming impossible for unrepresented late applicants to obtain EUSS status. This is because they are unaware of what they need to explain and what evidence to provide. For those with representation, in many cases they can only get the Home Office to look at their situation again after sending a pre-action protocol letter before claim, or via direct intervention between their representative and a contact within the Home Office. This latter option is only available if organisations and representations have such contacts within the Home Office, as there is no general mechanism (e.g. a dedicated email address) for reconsideration requests of clearly erroneously rejected cases. Many other organisations and representatives are reporting the same to us - without a good lawyer late applicants are unable to address the complexity of showing the reasonable grounds that is necessary to obtain EUSS status.

The Explanatory Memorandum[12] to these changes states: "*The changes to the EU Settlement Scheme (EUSS) and EUSS family permit are estimated to have no significant direct or indirect impacts on business, charities or voluntary bodies."* This is categorically incorrect. People who are finally finding out that they need to apply for status, only to have their applications rejected without the right to administrative review or appeal, are turning to organisations, charities and the voluntary sector in complete despair.

The Home Office's position is that the only legal right of redress against a rejected late application is judicial review, which is a wholly inappropriate, expensive and risky form of challenge. The most recent round of the Government grant-funded organisations[13] [GFO] scheme that started in July 2023 is not designed to meet the situation created by the recent EUSS changes. Late applications are now clearly complex applications and as such are no longer covered by OISC Level 1[14] which was not the case when the funding grants were made. The strain of making complex late EUSS applications is therefore falling on the Level 2 OISC GFOs where capacity is more limited, and on charities and the voluntary sector who provide free EUSS advice. Level 2 OISC advisors are not permitted to make applications for Judicial Review applications or issue pre-action protocol letters[15]. The requirement for lot B of the grant funding (for complex applications) was to be accredited at OISC level 2. As a result, not all of the 13 organisations funded by the Government to provide complex support to vulnerable and at-risk EU citizens applying to the EU Settlement Scheme are accredited beyond level 2 and hence in a position to make applications for Judicial Review or issue pre-action protocol letters.

We therefore have the following urgent recommendations which we ask you to respond to:

Recommendations on the general changes to the Immigration Rules and policy on late applications

R1. In the aim of consistency and simplification across the Immigration Rules, we recommend EU10(1) is replaced with the following, which would introduce discretion to treat an application as valid, in line with other simplified Appendices such as SW 1.6 and PL 1.4:

*EU10. (1) An application made under this Appendix **may** be rejected as invalid where it does not meet the requirements in paragraph EU9.*

[12] https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1496-17-july-2023

[13] https://www.gov.uk/government/publications/eu-settlement-scheme-community-support-for-vulnerable-citizens/list-of-organisations

[14] https://www.gov.uk/government/publications/guidance-for-euss-advisers

[15] https://www.gov.uk/government/publications/competence-oisc-guidance-2012/oisc-guidance-on-competence-2017-level-2

R2. Use the discretion introduced in recommendation R1 to instruct caseworkers to take eligibility into account before rejecting an application as invalid. Introduce content into the guidance to allow caseworkers to accept an application as valid by exercise of discretion, where information and evidence suggests the applicant is likely to meet the eligibility criteria.

R3. Amend the EUSS Caseworker Guidance and practice on the treatment of late applications to return the threshold of 'reasonableness' to its ordinary meaning. In particular, the section "*Circumstances which will not generally constitute reasonable grounds for delay in making an application*" needs urgent amendment.

R4. Especially in the light of the consistent past practice of the Home Office to inform refused applicants that they could submit new applications, revise the guidance such that caseworkers have clear discretion to accept repeat applications where reasons for applying after the deadline are otherwise considered 'reasonable', and/or where information and evidence suggests the applicant is likely to meet the eligibility criteria.

R5. Engage constructively with stakeholders, including all grant funded organisations[16], to discuss the impact of the changes on their services. Urgently review the funding awarded to the grant funded organisation sector, as we have been told that these organisations are specifically not funded to help with challenging refusal or rejection decisions. We refer you to our correspondence of earlier this year[17], in which you reiterated "*The Home Office remains committed to supporting vulnerable citizens who are eligible to apply to the EUSS, and to ensuring no one is left behind.*"

R6. In the interests of equality of arms, create a mechanism, open to all, for the reconsideration of erroneously rejected applications (such as where evidence of reasonable grounds has been clearly overlooked) to minimise unnecessary litigation and further late applications.

R7. Recognise a right of appeal for applications rejected as invalid on the basis of not having a reasonable ground for a late application.

R8. Change the application form to either allow for far more than 300 characters to explain the reason for a late application, or to state clearly that where applicants need more space than the character limit permits, they should upload separate representations as evidence.

R9. Instruct all caseworkers to look at all uploaded evidence, to check whether more explanation is provided about the reason for a late application.

Recommendations for holders of EEA regulations documents

R10. Amend the guidance to reinstate having a document or status under the EEA regulations as an automatic reasonable ground for a late application.

R11. Contact everyone who has been granted a document or status under the EEA regulations, who the Home Office believes has not yet applied for EUSS status. Explain clearly to them that they need to

[16] https://www.gov.uk/government/publications/eu-settlement-scheme-community-support-for-vulnerable-citizens/list-of-organisations
[17] https://the3million.org.uk/publication/2023061301

apply for EUSS status, and reassure them that they will not be penalised for having missed the deadline.

Yours sincerely,

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